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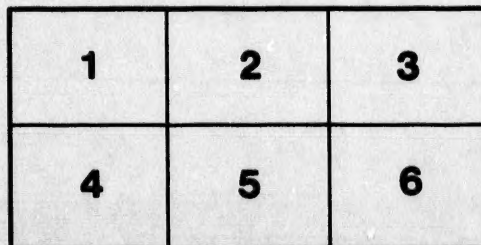
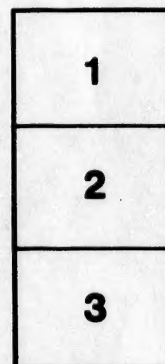
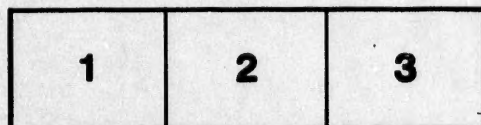
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2nd Session, 2nd Parliament, 9 Victoria, 1866.

PETITION

OF

ROBERT F. GORELAV, to be heard at the
Bar of the House, or before a Committee.

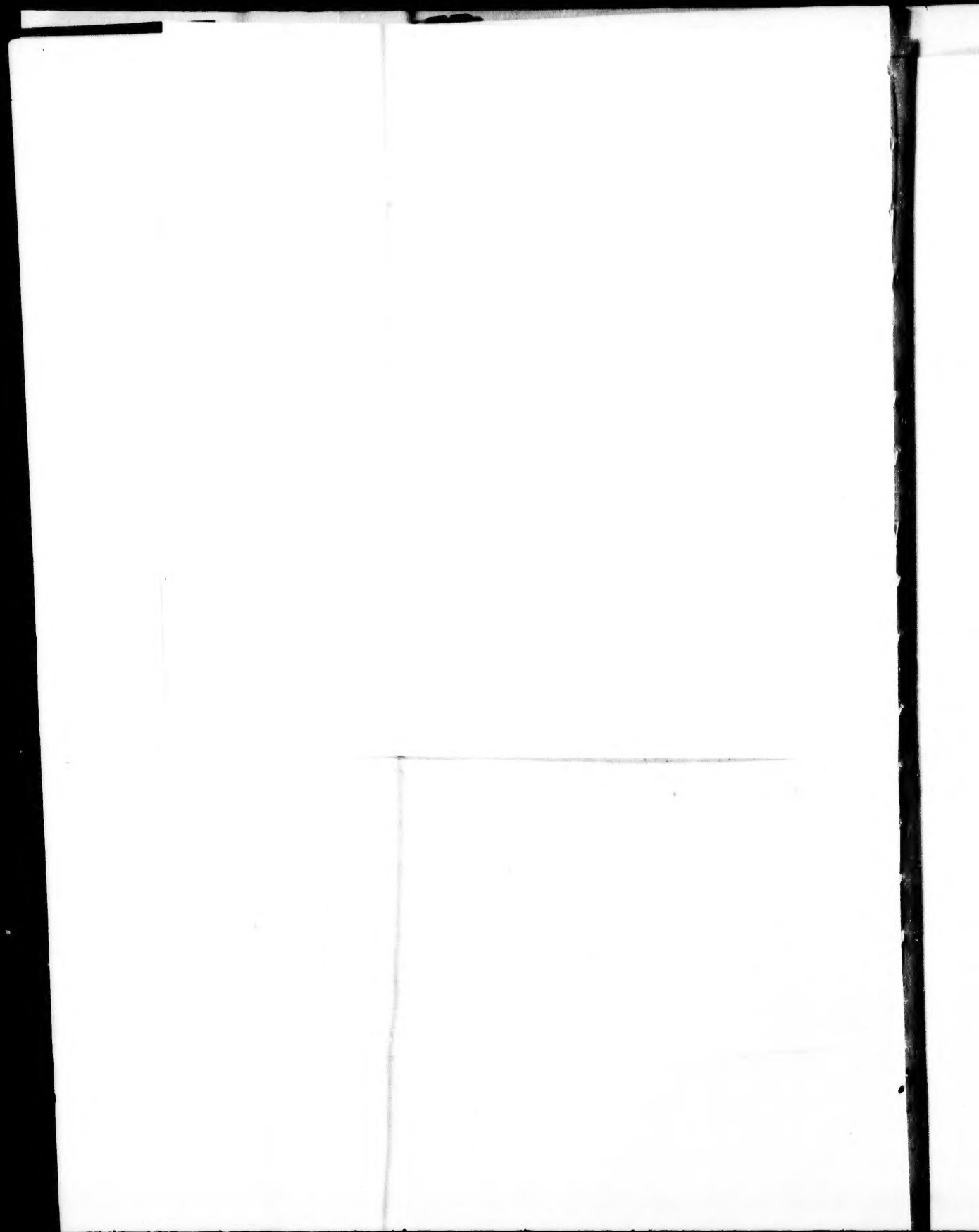
Printed by order of the Legislative Assembly

(200 Copies.)

PRINTED BY LOVELL AND GIBSON.

2nd Session, 2nd Parliament, 9 Victoria, 1866.

REVISION



P E T I T I O N .

To the Honourable the Legislative Assembly of the Province of Canada :

THE PETITION OF ROBERT FLEMING GOURLAY,

HUMBLY SHEWETH :

That in the case of Your Petitioner, a Report was submitted to Your Honourable House, September 11, 1841, as follows:—" Report of Select Committee, to whom was referred the Petition of Robert F. Gourlay, Esquire, have the honour to Report :

" Your Committee having investigated the Petition, and examined witnesses in relation to the same, and procured affidavits from persons cognizant of the matters and allegations contained therein, find the following facts fully proven.

" The Petitioner, Mr. Gourlay, first visited Canada, in the year 1817, where he had acquired property by marriage, and also by purchase; and commenced statistical enquiries into the capabilities of the Province; in the course of which he became aware of the existence of various abuses. He then proposed that a Commission should be appointed to proceed to Great Britain, to have these abuses rectified; and held public meetings for that purpose, accounts of the proceedings at which were published in a pamphlet, which was generally approved of by the people of the Province; but, by those in power, was considered as having a seditious tendency, and he was therefore arrested, and put on his trial for sedition, at Kingston; but, being acquitted, he was again tried at Brockville, with, however, a similar result. He, then, had to proceed to New York on business; and, on his return was imprisoned in the gaol at Niagara, where ill treatment, in being confined in a cell for five weeks in the dog days, debarred from the sight of or communication with his friends, his Counsel, and the Magistrates of the District, threw both his body and mind into such a state, as to render him totally unfit to defend himself, upon his trial, or even to comprehend his arraignment. The result of the trial was, that he was banished from the Province (for life,) under pain of death, should he return,—his alleged crime being that he neglected to quit the country upon the order of a single Magistrate (two Legislative Councillors) acting under an unjust construction of an unconstitutional Statute, most illegally exercised.

" Your Committee do not think it necessary to comment on such proceedings.

" From the evidence adduced, which will be found in the Appendix to this Report, Your Committee are of opinion, that the arrest and imprisonment of the Petitioner, in Niagara, in 1819, was illegal, unconstitutional, and without the possibility of excuse or palliation.

" That, debarring him from an interview with his friends, or his Counsel, was also illegal, unjust, and unconstitutional; that, preventing Magistrates of a County or District from visiting the gaol of that County or District is a violation of all propriety; and, if persisted in, would lead to the most pernicious consequences.

" Your Committee are further of opinion that his trial and sentence, when in a state of bodily and mental weakness, from sufferings which he had undergone, which prevented him from defending himself, was unjust, unconstitutional, and cruel.

" Your Committee cannot but express a hope that Your Honourable House will do the Petitioner that justice, which has been so long denied him, and pass an Address to His Excellency, the Governor General, declaratory of the above opinions, in order that the Crown may repudiate the transactions by which the Petitioner has been persecuted to his ruin; and, that the Legislature may declare his (sentence of) banishment null and void; and cause him to be compensated for the losses he has sustained by the unwarrantable exercise of authority. In the mean time, that some allowance be made to him to defray his personal expenses while in attendance before the Legislature defending the rights of a British subject.

" Your Committee are in possession of proofs, that during the (late) rebellion, when the Petitioner was resident in the United States, His Excellency, Sir Francis Bond Head, then Lieutenant Governor of Upper Canada, derived from him the most important intelligence of the movements of the brigands, then organizing for an attack on the Province. This, Your Committee humbly suggest, should neither be overlooked nor forgotten.

" All which is respectfully submitted.

" W. DUNLOP,

" *Chairman.*

" Kingston, September 11, 1841."

That, this Report was debated, sustained, and stood among Orders of the Day, for further debate, till the 16th September, when it was unanimously Resolved, that, a copy should be communicated to the Governor General. That, three weeks afterwards, the Administrator of the Government caused to be paid, to Your Petitioner, the sum of fifty pounds, in part of expenses, in compliance with the recommendation of Your Honourable House.

That, Your Petitioner then resolved to proceed to England, there to lay the whole matter before the Imperial Parliament; and, with that intent, applied for office copies of necessary papers, which he procured, all but copies of two affidavits, then missing.

That, Your Petitioner went to Quebec, for embarkation, hoping to see the Governor General, and be assured by him that copies of the said affidavits would be forthcoming when required, &c. But, finding that His Excellency would first arrive at Kingston, Your Petitioner returned to that place, where, to his astonishment, he was served with a copy of a Report of a Committee of the Executive Council, withstanding the opinions of Your Honourable House; and thus, it became necessary that he should remain in America till the Provincial Parliament was again in Session.

In the month of September, 1842, Your Petitioner had a Petition presented to Your Honourable House, complaining of irregularity on the part of Crown Ministers, and praying for enquiry into the same.

That Petition was referred to a Committee, which waived its only object, and recommended that a pension should be granted to Your Petitioner, "*in consideration of his losses and sufferings*," which he could not accept, as that recommendation conflicted with the Report of a 1841. In fact, it has subjected your Petitioner to unspeakable distress; certainly, not intentionally, for Your Petitioner is assured, that it proceeded from the greatest kindness. It put an end to all hope of appeal to the Imperial Parliament, and furnished excuse for denying Your Petitioner any allowance, recommended by Your Honourable House, to be made to him, "while defending the rights of a British subject."

The Report of 1841 was well digested, and regularly debated. Never was there a question before Your Honourable House, wherein the dignity of the Crown was so deeply involved; never were responsible Ministers so pledged to watchfulness, as when this question was debated. If aught could be said in behalf of ill used power, then was the time to say it. But, in fact, no plea could be put in, which could not instantly be repelled. Not a word, in opposition, fell from Ministers of the Crown, on that occasion. On the contrary, all acquiesced, at every stage; and joined in the unanimous vote for addressing the Governor General.

After business was thus finished, what right had Ministers of the Crown, to draw up a Report in contradiction of the opinions of Your Honourable House? Sir Richard Jackson had previously declared to your Petitioner, that he would not enter on the consideration of the question, because "he was only in the temporary Administration of the Government," and Your Petitioner had never expected that he would do any thing of the kind. To Your Petitioner, first and last, it has appeared a result of treachery and clandestine interference;—treachery on the part of the Crown Ministers, and interference of some party interested in the issue: nor can Your Petitioner imagine any subject more imperatively demanding inquiry. To him, the Report of the Committee of the Executive Council seems a tissue of unwarrantable assertions, and fallacious arguments; and, he believes it was served upon him, in the hope, that he would succumb, or perish in unequal combat.

Your Petitioner returned to Canada, as a peace maker and for benevolent objects. He was encouraged to remain, and Petition the Legislature, by the unbounded kindness of the inhabitants. Your Honourable House has ever manifested, towards him, the warmest sympathy; and, his saddest reflection is, that, stern duty has held him up as regardless and ungrateful. Indeed, duty to the rights and respectability of Your Honourable House has thrust him into this cruel dilemma.

Since 1841, Your Petitioner, though labouring under every disadvantage, has never, for a moment, relaxed exertions in this great cause,—the cause of truth and justice, which is equally your's and his;—a cause which must now or never be determined, as he is fast sinking beneath age and infirmity.

In 1842, your Committee pleaded want of time for a full discussion of the subject. Now, there is need of no such plea;—now, Your Honourable House can investigate every circumstance, withstand every assault, and arrive at a satisfactory end.

Your Petitioner has no doubt whatever, that Your Honourable House can sustain the Report of 1841, against that of the Executive Council; and, that opposing forces may be viewed at once, he will annex, hereto, a copy of that Report.

He now entreats, that the whole of these premises may be taken into the serious consideration of Your Honourable House.

And, as in duty bound, he will ever pray.

ROBERT F. GOURLAY.

MONTREAL, April 2nd, 1846.

Copy of a Report of a Committee of the Executive Council, of the 10th December, 1841, and approved by His Excellency, the Administrator of the Government, in Council, on 13th December, on the application of Mr. Robert F. Gourlay.

The Committee of Council, in obedience to Your Excellency's commands, have considered the application of Mr. Robert F. Gourlay, praying to be informed, what he has to expect from the Executive Government, in consequence of an Address of the Honourable the Legislative Assembly, founded upon a Report of a Select Committee of that Honourable House, of which the following is an extract. "Your Committee cannot but express a hope, that Your Honourable House will do the Petitioner that justice, which has been so long denied him, and pass an Address to His Excellency, the Governor General, declaratory of the above opinions, in order that the Crown may repudiate the transaction by which the Petitioner has been persecuted to his ruin, and that the Legislature may declare his sentence of banishment null and void, and cause him to be compensated for the losses he has sustained, by this unwarrantable exercise of authority; and, in the mean time, that some allowance be made to him, to defray his personal expenses, while in attendance before the Legislature, defending the rights of a British subject."

The wrong complained of, by Mr. Gourlay, appears to have originated in an Act of the Provincial Parliament, passed in the year 1804, entitled "An Act for the better securing this Province against all seditious attempts, or designs, to disturb the tranquillity thereof."

This Act authorized the Governor, Lieutenant Governor, or person Administering the Government of the Province, the Members of the Legislative and Executive Councils, the Judges of the Court of King's Bench, or other persons authorized in that behalf, by warrant, to arrest any person or persons, not having been an inhabitant, or inhabitants of the Province, for the space of six months, next preceeding the date of such warrant, and not having taken the oath of allegiance, who, by words, actions, or other behaviour or conduct, hath or have endeavoured, or hath or have given just cause to suspect that he, she, or they, is or are about to endeavour to alienate the minds of His Majesty's Subjects of the said Province, from his Person or his Government, or, in any ways, with a seditious intent, to disturb the tranquillity thereof; and, upon such arrest, and upon examination, to order such person to leave the Province."

The same Act provides "that, upon any such person being found at large within the Province, without license to return granted by the Government, he should be committed without bail, until released by the Government, or be delivered by the Court of Oyer and Terminer, in due course of Law, and that he should be liable to imprisonment and banishment, from which banishment if he should again return, without license, he should be liable to suffer death, as a felon."

This Act has been long since repealed,—in the opinion of the Committee, most wisely and properly, by the Legislature; but, in the consideration of the present question, the Committee feel bound to look to the Law as it stood at the time of the events complained of.

It appears that Mr. Gourlay, upon information given upon oath, by a Member of the House of Assembly, was arrested and brought before two Members of the Legislative Council, upon a charge of having endeavoured, by words, actions and behaviour, to alienate the minds of His Majesty's subjects from the King's Person and Government, and to raise a rebellion against the King's Government in the Province; and, not being able to give full and complete satisfaction to the gentlemen who issued the warrant, on these points, he was ordered, by them, to quit the Province, within a time limited.

Mr. Gourlay chose to disregard the order thus given, and, by his disobedience, rendered himself liable to the penalties of the Act; and, being found at large within the Province, contrary to its provisions, he was arrested, tried, and convicted, upon the Statute; and sentenced to be imprisoned and banished. Mr. Gourlay now claims redress, and is desirous to know the intentions of the Executive Government respecting his case.

It appears, that, in accordance with one part of the Address, Your Excellency has directed a payment to Mr. Gourlay of Fifty Pounds.

It is further required by the Address, that, the Government should repudiate the transaction.

The proceeding against Mr. Gourlay does not appear to have been an act of the Executive Government, but of a tribunal exercising extraordinary and extensive power, and having the widest discretion as to the mode in which it should be used. In assenting to the repeal of the Act itself, the Government has already expressed its opinion, in the strongest manner, against the continuance of such arbitrary power in any person, or body of persons; but, the Committee do not see how the disavowal of the act of persons, over which the present Government of the Province had no controul, can, in anywise, help Mr. Gourlay's case.

If the legality of the proceeding be called in question, on the ground that the Statute was not intended to apply to British subjects, a reference to the Act itself will shew, that actual residence in the Province, and the taking the oath of allegiance, were the necessary qualifications which would exempt any person from the operation of the Law. The being a natural born subject of the Crown does not enter into the question.

On looking to the history of the time when the Act was passed, only a few years after the suppression of a formidable rebellion in Ireland, and almost immediately after an attempt of the same nature in the same country, and, at a period when the war of the French revolution was raging,—a contest of principle by which all men's minds were more or less agitated, it is not extraordinary that such a measure should have been entertained in a distant, and then weak portion of the empire. There is no good reason to suppose that it was not intended to operate against British subjects, quite as stringently as against foreigners, and the power summarily to prevent even British subjects from settling in British Colonies, and ordering them to depart therefrom, was not so unprecedented as to found an argument on the impossibility of the Upper Canadian Legislature meaning to extend the provisions of the Law to all persons, whose presence in the Province appeared to be dangerous to its peace, and who came within the strict letter of the Act. There is no ground to question the power of the Legislature to pass such an Act; and, the repudiation of the proceedings under it, as illegal, would, without benefitting Mr. Gourlay, have the effect of a declaration purporting to make invalid what was, nevertheless, manifestly legal, however harshly the Law may have operated against the applicant for redress.

If the Statute of the Provincial Parliament be admitted to be valid, it will be seen that the widest power and discretion were given to those who were to act under it.

It appears not to have been necessary for the procurement of an order to leave the Province, to state or prove any positive overt acts of sedition, or treason, to produce a general impression from a person's act or general deportment. Even "*amounting to suspicion*," was all that was necessary, and the Law appears to have been so far complied with. A satisfactory enquiry into the grounds for the proceedings, would, at this day, if practicable, tend to no good purpose. Mr. Gourlay suffered for direct disobedience to the Law, as it stood.

He could not legally have been acquitted by any jury, for such disobedience; and, no regret that such a Law should have existed, or that it should have been used with severity against him, and no commiseration for his sufferings, will authorize the admission of the dangerous and destructive principle, that individuals are to judge for themselves, and, with impunity, act in defiance of the positive Law of the land.

Mr. Gourlay appears legally to be in a position requiring protection from the sentence passed upon him, as to its future operation. The Committee believe that he might, at any time, since the repeal of the Act in question, have procured this protection by means of a pardon, under the great seal; and, there is no good reason why, if he wishes it, he should not be granted a pardon now:—but he further seeks pecuniary indemnity, for what he considers an illegal prosecution and conviction, which cannot be granted in the shape he requires it, unless it can be shewn that the prosecution and conviction were really illegal.

Before any grant of indemnity can be made to Mr. Gourlay, it is necessary that the matters should be brought under the consideration of the Legislative Assembly, by the Government. It is not the intention of the Committee of Council to advise a limitation of the liability of the Legislative Assembly, by withholding, from it, an opportunity of granting a sum of money, which would relieve Mr. Gourlay, to any moderate extent; but, it would be unjust to him, were he to be permitted to remain under the impression that the Government recognizes the illegality of the sentence pronounced against him, or liability of the public funds to indemnify him, as a matter of right, against the consequences of his own deliberate infringement of the Law of the Province.

Certified,

(Signed,)

WM. LEE, S. E. C.

PETITION.

To the Honourable the Legislative Assembly of the Province of Canada.

THE PETITION OF ROBERT FLEMING GOURLAY:

HUMBLY SHEWETH:

That, Your Petitioner has been before the Legislatures of Upper Canada, and Canada, these last ten years, defending his rights, as a British subject, and keeping in view his landed property in the Province.

That, being in the State of Ohio, in the year 1836, he had a Memorial presented to the House of Assembly, Upper Canada, reciting facts, and suggesting measures, but with no special prayer.

That, being in the Township of Niagara, in Upper Canada, in the year 1839, he had a Memorial, presented to the Assembly, continuing the recital of facts, and praying for a commission to investigate, on the spot, all the circumstances as to his imprisonment, in Niagara Jail, in the year 1819.

That, had this simple prayer been acted on, Your Petitioner would immediately have gone to England, there to lay evidence, obtained, before the Imperial Parliament: but, instead of this, an Address was carried to the Lieutenant Governor highly injurious to Your Petitioner; in so much, that he was thereby obliged to remain in Upper Canada, under most distressing circumstances.

That, in the year 1841, Your Petitioner had a Petition presented to Your Honourable House, including copies of the above mentioned Memorials, with other Documents; and praying that all should be seriously considered.

That, this Petition was referred to a Select Committee, and reported on, to the entire satisfaction of Your Petitioner.

That, a Petition was presented to Your Honourable House, this present Session, including the Report of 1841, and having, annexed, a Report of the Executive Council;—all of which has been printed.

That, Your Petitioner, from respect to Your Honourable House, attached to this Petition no special prayer,—believing that Your Honourable House would, on sight of the Report of Council, repel the assaults thereof, and sustain its own positions; but, after debate, nothing was concluded; and, it is now the duty of Your Petitioner to speak for himself, which he proceeds to do:—

The Report of Council is cunningly devised. In its assertions, it is bold and deceptive; and,—in its arguments, fallacious;—sometimes begging the question, when that is inadmissible; and, often insinuating, purposely to mislead. In one place, it takes for certain, what, in another, it gives up to doubt. It does not state, fairly, under what circumstances the Act of 1804 was framed; and, makes question as to its application, while none can be entertained.

In the year 1802, there remained, under sentence of death for rebellion in Ireland, many persons whom the Government was loth to execute, after the general peace. An offer was therefore made, that they should go free, on condition of expatriating themselves, and leaving the kingdom for ever,—which offer, they gladly accepted. Some of them went to the United States, where they found many rebel friends, who had escaped from Ireland; and, were soon after joined by others, who fled from justice, after the insurrection in Dublin, in the year 1803.

It was to protect Upper Canada against these desperate men that the Act of 1804 was passed; and, towards them or aliens, there was nothing in it to be complained of, however barbarous; for, they lay under no necessity of going into the Province; and, if there, could suffer no damage, by an order to depart. How very different was the case of Your Petitioner! He was an unattainted British subject: had right to land, in Upper Canada, ten years before he set foot in it:—and, moreover, after two honourable acquittals on jury trial, had, in confidence of security, sent to England a Power of Attorney for settlement of his affairs in Great Britain, in order that he might, untrammelled, establish a Colonial Land Agency. Would any man, so circumstanced, obey an order to leave the Province? Certainly not.

The Report of Council says, that: "*Being a native born subject of the Crown does not enter into the question.*" Monstrous effrontery! Did the writer of that Report not know the distinction between *natural* and *local* allegiance? or, did he mean to sink the condition of an unattainted

British subject to the level of that of aliens, expatriated persons, and outlaws? But, before uttering this unblushing assertion, he had declared,—referring to the Act itself, “*that actual residence in the Province and the taking the oath of allegiance were the necessary qualifications which would exempt any person from the operation of the law.*” Even, here, the Report of Council falsifies, in substituting *AND* for *OR*. But, in no way, was Your Petitioner subject to the law:—for, he had not only taken the oath of allegiance, but had actually resided in the Province eighteen months before he was ordered to depart;—and, when he sued for liberation by Writ of *habeas corpus*, an affidavit was attached to the Writ, testifying that he had been domiciled, in one house, nine months, viz: in the house of Robert Hamilton, Esquire, of Queenston, who is still alive to confirm the same.

The Chief Justice of Upper Canada, when he remanded Your Petitioner to prison, after sight of that and other affidavits, most assuredly sinned against knowledge,—judged contrary to evidence; and, on the Bench, when Your Petitioner was tried before him, got out of the difficulty by telling the Jury that, *to be an Inhabitant of Upper Canada, a person must occupy a house of his own, in the Province*—a perversion, which was happily reduced to an absurdity by Doctor Dunlop when debating the question before Your Honorable House, in 1841.

Monstrous to think! Your Petitioner was banished, solely, on that perverted charge, while so weak with cruel treatment in prison, as to be unable to protest against proceedings; and, now, after the clearest evidence of all this,—obtained by the Committee of Your Honorable House,—even now, Your Petitioner still rests under the ban of banishment; and, for twenty-seven years, has been out of possession of his property, in England and Scotland, because of false imprisonments in Upper Canada;—aye, and after all, the writer of the Report of Council drivels about “*commiseration*,” and says, that Your Petitioner, “*if he wishes it*,” may be “*granted a pardon, none!*” Could anything, more insulting, be penned?

Your Petitioner is told that, he cannot again be heard by Your Honorable House, unless he prays for compensation, in money. In reply, he has to say, that he never asked for money from the people of Upper Canada, or Canada. In no one of his Petitions, was there a prayer for that. He sought only for evidence to be laid before the Imperial Parliament, and had the Assembly, in the year 1839, granted his prayer, he would have been satisfied;—so too, in the year 1841, had not the Executive Council thrown a bar in his way. That year, Your Petitioner addressed a letter, to the Chairman of the Committee of Your Honorable House, stating what he wanted, and concluding thus: “*The opinion of the House being expressed to the Governor, nor, I could return to Britain, regain my family, and be, there, compensated.*”

Your Honorable House did, in the year 1841, gratuitously recommend that, Your Petitioner “*should be compensated for losses; that, in the mean time, some allowance should be made to him, while defending the rights of a British subject*,” and, in conclusion, suggested that, “*What he did (for the Government) in the late rebellion, should neither be overlooked nor forgotten.*” With all this, Your Petitioner was well pleased; and, doubtless, all would have been allowed, but for the Report of the Committee of the Executive Council. At present, in the opinion of Your Petitioner, there is only one question for consideration, viz:—Are the opinions expressed in the Report of Your Honourable House, 1841, sound and true?—or, have they been proved to be otherwise, by the shewing of the Report of a Committee of the Executive Council?

Your Petitioner never had a doubt, in his own mind, that his imprisonment, in Niagara, in 1819, was, as Your Honourable House declared, “*illegal, unconstitutional, and without the possibility of excuse or palliation.*” But, as a dispute subsists between Your Honourable House and the Executive Council, he would have the final issue reached, in so very grave a matter, by the best means, and most constitutional steps. Sir Richard Jackson had, no doubt, forgotten his determination not to interfere in this business, as “*being only in the temporary administration of the Government*,” and, afterwards, been imposed upon by the very specious language of the Report of the Committee of the Executive Council, when submitted for approval. The Governor General is now otherwise situated; and, it would be proper that His Excellency should review the whole facts, and arguments, on both sides. Many points remain to be noticed, which the limits of a Petition preclude; and, Your Petitioner would humbly suggest, that Your Honourable House should appoint a Committee to prepare the whole to be laid, by Address, before His Excellency, the Governor General.

He now, therefore, entreats that he may be heard in person, or by Counsel, at the Bar of Your Honourable House; or, before such a Committee.

And, as in duty bound, he will ever pray.

ROBERT F. GOURLAY.

Montreal, May 1, 1846.

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